

THE EVOLUTION AND STATUS OF JURISDICTIONAL MEASURES GOVERNING FOREIGN PARTIES AND INTERNET TRANSACTIONS IN CHINA

by

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Commercial activities in China are increasingly international in characteristic given its economic liberalization and use of modern telecommunications to transact with global markets. As a consequence, the number of general disputes involving foreigners that are adjudicated by the Chinese courts has witnessed a parallel increase over the years. Conflict of law questions including jurisdiction are some of the foremost legal challenges facing parties intending to use Chinese courts to redress their disputes. The paper examines major Chinese legal measures addressing the question of jurisdiction involving foreigners that would have implications on international commercial activities in general and the Internet related activities in particular. After briefly tracing some general characteristics, the paper investigates the jurisdictional issues and choice of forum in legal disputes involving foreign parties. The Doctrine of Lis Pendens and Forum Non Convenience as manifested in China are examined in context. The paper investigates how Chinese legal regime and judicial response are evolving to address challenges relating to internet transactions. In this regard, the dynamics of the judicial response governing internet specific copyright challenges is specifically examined. The evolution and status of the Chinese conflict of law regime traced in the paper is expected to reveal its strength and weaknesses in addressing major concerns and skepticism regarding the role of Chinese courts as viable forums for settlement of disputes in international commercial and internet transactions.

KEYWORDS

Chinese conflict of laws, rules of jurisdiction in China, jurisdiction and foreign parties, Internet jurisdiction, Internet copyrights

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1. INTRODUCTION

International growth of the Internet and adoption of E-business practices have influenced China, which continues to grow in terms of the Internet usage in all walks of life including businesses enterprises. In spite of relative disadvantages China faces in areas like IT infrastructure, IT literacy etc in comparison with many of the developed countries, the growth of internet usage has been phenomenal. China is already said to have overtaken USA¹ as the average number of hours spent per person in China is argued to have outstripped similar average in USA by manifold. The Report on Internet Development in China 2008 presented some interesting data as to the growth the use of the Internet in China.² The high growth of Internet users and the high average number of hours of internet usage in China have been achieved in spite of the fact that its Internet penetration rate is still lower than the average global standard and much lower compared with the Internet penetration in USA.³

China's entry into the World Trade Organization (WTO) had increased Chinese trade both in exports and imports. The increasing internationalization of commercial activities in China is facilitated by the Internet for both international business enterprises targeting China as well as Chinese enterprises targeting worldwide markets. Given the large number of modes and methods of offering E-business from far and near in both B2B and B2C E-business sectors, one of the major sets of legal challenges facing E-business enterprises in China pertains to conflict of law issues. Among various issues, the question of jurisdiction involving foreign parties is of particular interest for E-businesses dealing with China. The number of general disputes involving foreigners that are adjudicated by the Chinese courts has witnessed a parallel increase with the growth of the trans-border commercial activities over the years. The questions of jurisdiction of the courts, applicable law and enforcement of judgments involving foreigners are some of the foremost legal challenges facing parties intending to use Chinese courts to redress their disputes.

The present paper closely examines major Chinese legal measures addressing the question of jurisdiction involving foreigners that would have implications on international commercial activities in general and the Internet related activities in particular. After briefly tracing the characteristics of

¹ Natalie Pace 04.03.2006, 'China Surpasses U.S. In Internet Use', The Forbes Magazine online version at <http://www.forbes.com/2006/03/31/china-internet-usage-cx_nwp_0403china.html>

² China Internet Network Information Center 2008, Statistical Survey Report on the Internet Development in China, CNNIC, Beijing.

³ The Internet penetration rate in China is 3.1 percentage points lower than the average global standard of 19.1% and 53.7 percentage points lower than that of USA. See *id.* at p.13.

the conflict of law regime and the judicial system, the paper investigates the jurisdictional issues and choice of forum in legal disputes involving foreign parties in China. The Doctrine of *Lis Pendens* and Forum Non Convenience as manifested in the Chinese context are then examined in context. The general principles of jurisdiction which are applicable to all disputes including those involving foreigners are examined before the exclusive principles of jurisdiction relating to foreigners are specifically explored. The paper investigates how Chinese legal regime is evolving to address specific questions of jurisdiction that are raised in the context of internet transactions (including those involving foreign parties). In this regard, the issue of jurisdiction relating to copyright over the internet is focused and the dynamics of the legal response addressing internet specific copyright challenges are identified. The examination of the evolution and status of the Chinese conflict of law regime in this paper is expected to reveal its strength and weaknesses in addressing major concerns and skepticism regarding the role of Chinese courts as viable forums for settlement of disputes relating to international commercial and internet transactions.

2. CHARACTERISTICS OF THE CHINESE LEGAL AND JUDICIAL MECHANISM

Until China opened up its markets to international trade and commerce, the Chinese conflict of law rules were mostly not in statutory form. The issues of conflict of laws were addressed on an adhoc basis often depending on the nature of the facts of the case and origin of the foreign parties. Since adjudication of such cases identifying the conflict of law rules or addressing related issues did not have any binding effect it was not possible to make generalization of conflict of law principles from judicial decisions.⁴

The lack of statutory provisions and the limited role of judicial decisions in laying down the principles of conflict of law in China often led to uncertainty, which was considered as an obstacle for the expansion of international trade and commerce in China. This uncertainty prompted codification of conflict of law rules through different statutory instruments. Civil law principles and civil procedural rules addressing conflict of law issues relating to foreigners were enacted. Unlike common law jurisdictions, where the conflict of law principles could also be derived from the judicial decisions, the major source of conflict of law rules in China (being a civil law system) remains statutory. Therefore, the examination of the character-

⁴ However, it is interesting to note that a form of precedent system is being attempted in China. See Victor (ed.) 5-8-2003, 'China's Higher Court Issues First Legal Precedent', Judicial News, Published online by Supreme People's Court of PRC available online at <<http://en.chinacourt.org>>

istic and scope of the legal measures relating to conflict of law issues in China should closely examine relevant Chinese legislation.

3. ECONOMIC LIBERALIZATION AND EVOLUTION OF PRINCIPLES OF JURISDICTION

After China started to slowly open its markets to the outside world in 1980s, it felt the need to develop relevant legal framework governing its economic relations with the outside world. One of the earliest initiatives in this regard is the Foreign Economic Contract Law 1985 (FECL 1985) which contained some general provisions which briefly addressed the issue of jurisdiction and applicable law. For example, the law recognized the choice of arbitration by parties⁵ and in the absence of such agreement the people's court could exercise jurisdiction. Since the rules relating to jurisdiction were limited they raised some doubts about the scope of jurisdiction of Chinese courts over economic contracts involving foreign elements.⁶ In order to clarify different provisions of the FECL 1985 the Supreme People's court provided two major judicial explanations namely "Reply Concerning Several Issues Relating to the 'Law on Foreign Economic Contracts Involving Foreign Interests'" and "Reply Concerning Several Issues on Hearing Economic Disputes Involving Hong Kong and Macao Interests" on 19 October 1987.⁷ These two replies explained some jurisdictional issues on economic contracts and disputes involving foreign elements in general and elements from Hong Kong and Macau in particular. After the initial piecemeal approach to jurisdictional issues, China moved to address the jurisdictional issues in a more comprehensive manner through its civil procedure law in early nineties.⁸

The legal measures relating to the jurisdiction of Chinese courts were mainly addressed the Civil Procedure Law of the People's Republic of China adopted on April 9, 1991 (CPL 1991). CPL 1991 dealt with two sets of

⁵ See Article 38, Foreign Economic Contract Law 1985.

⁶ See for an argument that the interpretation of the provisions relating to jurisdiction of the Foreign Economic Contract Law created an uncertainty as to whether the Chinese courts enjoyed exclusive jurisdiction in such cases or whether the parties could submit such cases to the jurisdiction of a foreign national court? Andrew Armfelt 1987, 'Foreign Economic Contract Law of the People's Republic of China', *International and Comparative Law Quarterly*, vol. 36, pp.151-156. The author also argues that similar uncertainties existed in applicable law provisions of the law.

⁷ See Reply Concerning Several Issues Relating to the Law on Foreign Economic Contracts Involving Foreign Interests 1987 and Reply Concerning Several Issues on Hearing Economic Disputes Involving Hong Kong and Macao Interests 1987 as referred in Ding Ding, 'China and CISG' in Michael R. Will ed.1999, *CISG and China: Theory and Practice*, Faculty of Law, University of Geneva, Geneva, pp.25-37.

⁸ Moreover, the Contract Law of the People's Republic of China 1999, which came into force on 1 October 1999 simultaneously, repealed the Economic Contract Law of the People's Republic of China, the Foreign Economic Contract Law of the People's Republic of China, and the Technology Contract Law of the People's Republic of China. See Article 428 the Contract Law of the People's Republic of China 1999.

jurisdictional issues. The first set of issues was related to the different types of jurisdiction that are generally exercised by the Chinese courts. The second set of issues specifically dealt with foreign parties stipulating the procedures governing them. Since the CPL 1991 was enacted the number of disputes adjudicated by Chinese courts have increased manifold including the cases involving foreign interests. The experience of the CPL 1991 over more than a decade however revealed some lacuna in the statute in addressing certain issues. For example, the 1991 statute was perceived to have limitations in addressing the issue of retrials⁹ and reforms were sought for the amendment of the law. In response to the needs, a new civil procedure law was introduced during 2008.

The Civil Procedure Law of 2008 (CPL 2008) was promulgated by the 30th Session of the Standing Committee of the 10th National People's Congress on 28 October 2007 and came into effect on 1 April 2008. The CPL 2008 contains two sets of rules of jurisdiction relevant to foreign parties. Firstly, there are general rules of jurisdiction that are applicable to all types of parties before the people's courts, which are also extended to foreign parties. Secondly, there are some special provisions applicable to the foreign parties in particular. The following sections of this paper will closely analyze both set of rules applicable to the foreign parties. Apart from the two sets of jurisdictional rules, the CPL 2008 interestingly has included 'error in exercise of jurisdiction' as one of the grounds for seeking retrial. A case could be retried if the party seeking retrial establishes any one of the grounds for retrial prescribed by the CPL 2008.¹⁰ Establishing that an error in jurisdiction was made in violation of the law has been newly added as one of the grounds for retrial. Such inclusion is particularly significant in the context of the criticism that Chinese courts tend to overlook the issue of jurisdiction.

4. GENERAL RULES OF JURISDICTION

The CPL 2008 confers jurisdiction on civil cases to the people's courts of China. The CPL 2008 provides the rules of jurisdiction in two different parts, one providing general rules of jurisdiction and the other specifically addressing the rules of jurisdiction relating in cases involving foreign parties or interests. The part dealing with general rules of jurisdiction addresses three major set of issues namely the levels of jurisdiction, territorial jurisdiction and referral and designation of jurisdiction. The first set of is-

⁹ It contained only five grounds under which retrial could be sought. See Article 179, The Civil Procedure Law of the Peoples Republic of China 1991.

¹⁰ The CPL 2008 has included almost ten new grounds for retrial over and above those which were already present in the 1991 Civil Procedure Law. See Article 179, Civil Procedure Law 2008.

sues relating to the levels of jurisdiction deals with the four levels of the people's courts and the scope of their jurisdiction as first instance courts. In order to initiate an action in the people's courts in first instance both subject matter jurisdiction and territorial jurisdiction should be satisfied. The CPL 2008 requires that in order to initiate an action the suit must a) fall within the 'range of civil actions' accepted by the people's courts and b) be within the jurisdiction of the specific people's court where the suit was filed.¹¹

The intermediate people's courts are conferred with first instance jurisdiction in three specific types of civil cases. Firstly, the major cases involving foreign parties are required to be filed in the intermediary court in first instance instead of the basic level courts. Secondly, if a case is considered to have a significant impact in the areas over which a concerned intermediate people's court exercises jurisdiction, such case need to be filed in first instance in that intermediary court instead of the basic court. Finally, the Supreme People's Court could determine certain type of cases to fall under the first instance jurisdiction of the intermediate people's courts. A higher people's court, similarly, is allowed to exercise first instance jurisdiction over civil cases that significantly impacts the areas over which that court exercises jurisdiction.

The CPL 2008 also recognizes two types of civil cases, where the Supreme People's Court could exercise jurisdiction in first instance namely a) cases that significantly impacts the whole country and b) cases that the Supreme People's Court deems it should try itself. Interestingly, the CPL 2008 recognizes specifically the right of the foreign parties to appeal a decision of the court of first instance if they disagree with its judgment or ruling.¹² Although the CPL 2008 prescribes different cases, where the four levels of people's courts would have jurisdiction in first instance, it provides for the possibilities for exchange of such cases between different levels of courts.¹³

After dealing with the levels of jurisdiction the CPL 2008 addresses the second set of issues relating to territorial jurisdiction. The CPL 2008 provides general rules to determine the places where civil disputes in general could be filed and specific rules to determine the place where specific actions like different types of contractual claims, actions in tort, maritime claims, property disputes etc could be filed. The general rules provide a default rule of territorial jurisdiction and then recognizes some exceptions to it. The rules provide that a civil action instituted against a citizen shall fall within the jurisdiction of the people's court in the defendant's place of dom-

¹¹ See Article 108 (4), Civil Procedure Law 2008.

¹² Article 247, Civil Procedure Law 2008.

¹³ See Article 39 of the Civil Procedure Law 2008.

icile unless that place is different from the place of the defendant's habitual residence, in which case the people's court in the latter place will have jurisdiction. In case of a civil action against a legal person or an organization, the people's court in the place where the defendant is domiciled is conferred with the jurisdiction. In case of multiple defendants having different places of domicile or habitual residence, all the people's courts in those places are empowered to exercise jurisdiction. Although the default rule provides jurisdiction to the people's court in the place of defendants domicile certain specific exceptions are recognized by the CPL 2008, where the people's court in the place of plaintiff's domicile or habitual residence is conferred with the jurisdiction.¹⁴

The specific rules of territorial jurisdiction firstly deals with actions related to general contractual disputes. In such actions, the CPL 2008 provides jurisdiction to an additional people's court (other than the one in the defendant's place of domicile) namely the people's court in the place of performance of the contract in question. Apart from the general contracts, the CPL 2008 provides rules of territorial jurisdiction relating to special contracts like insurance contracts,¹⁵ negotiable instruments,¹⁶ and transportation contracts.¹⁷

The CPL 2008 provides the jurisdiction for actions in tort to the people's court of the place of defendant's domicile or the place where the tort was committed. Other than this general rule, the CPL 2008 also provides rules of territorial jurisdiction relating to specific types of tortuous claims namely actions involving transportation accidents¹⁸ and maritime accidents.¹⁹ Since in most types of disputes more than one people's court could exercise juris-

¹⁴ The specific civil actions that needs to be filed in people's court in the plaintiffs place of domicile or habitual residence includes personal relationship actions against persons not residing within the territory of the PRC or whose whereabouts are unknown or who have been declared missing and actions against persons who are undergoing rehabilitation through labor or who are imprisoned. See Article 23, Civil Procedure Law 2008.

¹⁵ For disputes relating to insurance contracts the jurisdiction could be exercised by the people's court either in place of the defendant's domicile or the location of the insured object. See Article 26, Civil Procedure Law 2008.

¹⁶ For negotiable instrument related actions, the people's court either at the place of defendants domicile or the place of payment made on the instrument could exercise jurisdiction. See Article 27, Civil Procedure Law 2008.

¹⁷ For contracts of transportation by railway, highway, water, or air transportation or combined transportation jurisdiction is conferred on the people's court of the place of defendant's domicile or the place of departure or destination. See Article 28, Civil Procedure Law 2008.

¹⁸ For damage claims relating railway, highway, water or aviation accidents, jurisdiction is prescribed for the people's court in the defendants place of domicile or the place of accident or place of first arrival of the vehicle or vessel involved in the accident or place of first landing of the aircraft involved in the accident. See Article 30, Civil Procedure Law 2008.

¹⁹ For damage claims relating to collision of vessels or other maritime accidents jurisdiction of the people's court at the place of defendants domicile or place of collision or place of first docking of the vessel collided with or place of detention of the vessel at fault is prescribed. See Article 31, Civil Procedure Law 2008.

diction, the CPL 2008 foresees the possibility of a plaintiff filing an action in more than one competent court and resolves the issue by conferring jurisdiction over the people's court that first puts the case on its trial docket in comparison with the other people's court where the same action is filed. The CPL 2008 also grants 'exclusive jurisdiction' to the people's court in specific places in certain types of actions.

The third set of issues addressed by the general rules of jurisdiction of the CPL 2008 pertains to 'referring and designating of jurisdiction' to other courts arising out of the situation when the people's court where an action was originally filed does not have jurisdiction. If a people's court in first instance before accepting a case finds that the action under the case does not come under its jurisdiction, it is required to inform the plaintiff to file the action in the competent people's court.²⁰ However, if people's court discovers that it lacks jurisdiction after it accepted a case, it is required to refer that case to the competent people's court.²¹

The CPL 2008 also provides rules relating to jurisdictional challenges raised by the parties to a dispute. If the exercise of jurisdiction is challenged by a party after a case was accepted by the people's court, the challenging party is required to raise its objections within the time limit provided for filing the statement of defense. If such objection is found to be tenable the concerned people's court is required to refer the case to a competent people's court. If a party to a case objects to the jurisdiction of a people's court in first instance, that court is required to make a ruling with regard to that objection.²² Although such a ruling is appealable, if it is not appealed within the prescribed time limits or if it is made by the Supreme People's Court it shall become legally effective.

The consequence of not objecting to the jurisdiction of a people's court was debated in a case before the higher court in *Sino-Add (Singapore) PTE. Ltd. v. Karawasha Resource Ltd*²³ In this case, the Tianjin Higher People's Court held that although the defendant enterprise from Hong Kong did not appear before the court or put forward any objection to its jurisdiction it could be concluded that the defendant accepted jurisdiction of the court. Therefore, the court held that it has jurisdiction over the defendant pursuant to Article 243 of the Civil Procedural Law 1991. The interpretation of ab-

²⁰ See Article 111 (4), Civil Procedure Law 2008.

²¹ Disputes over jurisdiction between people's courts are required by the CPL 2008 to be resolved through mutual consultation or by a mutual superior people's court of the disputing courts.

²² See Article 140(2), Civil Procedure Law 2008.

²³ (2001) Gaojin-Zhongzi-No.257, the final judgment of Tianjin Higher People's Court as cited and discussed in Huang Jin and Du Huanfang 2005, 'Chinese judicial practice in Private International Law 2002', Chinese Journal of International Law, vol 4, no.2, p.647.

sence of an objection to the jurisdiction as acceptance shows the willingness of the people's courts to exercise jurisdiction over cases involving foreign parties even when a concerned party fails to appear.

5. RULES OF JURISDICTION RELATING TO FOREIGN PARTIES

The CPL 2008 addresses the issues relating to foreigners and foreign interests in a two pronged approach. Firstly, the procedural rights and obligations applicable to Chinese citizens recognized under the CPL 2008 discussed above are extended to foreigners. Secondly, a separate set of special provisions applicable to civil actions involving foreign parties are provided. The first approach of extending the procedural rights and obligations to foreigners is critical because many of the provisions of the CPL 2008 refer to 'citizens'.²⁴ For example, in defining the conditions to be satisfied, in order to institute an action in the people's court, the CPL 2008 requires that the plaintiff must be a citizen.²⁵ The issue of application of such provisions to foreigners is addressed through an umbrella provision of the CPL 2008, which simply extends the rights and duties under the law to foreign parties. However, the extension of such rights and obligations are subjected to one major condition. In case if the courts of a foreign country impose restrictions on the civil procedural rights of citizens, legal persons and other organizations of China, the people's courts will follow the principle of reciprocity and impose similar restrictions to the parties from that foreign country.

The CPL 2008, in prescribing a separate set of special provisions applicable to civil actions involving foreign parties, refers to some general principles. At the very outset, the question of how to resolve potential conflicts between the provisions of the CPL 2008 and China's International treaty obligations is addressed. In such a conflict, the CPL 2008 clearly recognizes that the provisions of the international treaty should prevail, however subject to the any reservations made by China in that treaty. The express recognition of precedence of international norms and obligations over the domestic legal measures, underlines the significance of international legal measures in the context of China.

The special provisions relating to foreigners address three major issues relating to jurisdiction. Firstly, it addresses the scope of the jurisdiction of the people's courts against foreign defendants and disputes involving foreign joint venture and cooperative ventures. Secondly, it addresses the issue of forum selection in specific types of disputes involving foreigners.

²⁴ See for example Article 3 which deals with the scope of the application of the CPL 2008 to disputes involving natural persons mainly refers to disputes among citizens and disputes involving personal relationships between citizens. Similarly, the definition of parties involving natural persons in Article 49 of the CPL 2008 mainly refers to citizens.

²⁵ See Article 108, Civil Procedure Law 2008.

Thirdly, it addresses the issue of time frame to challenge the jurisdiction of a people's court in a dispute involving a foreign party. The scope of the jurisdiction of the people's court on foreign defendants is specifically addressed in the context of contractual and property disputes. If such disputes are initiated against a defendant without domicile inside China, a relevant people's court may exercise jurisdiction if any of the following conditions are satisfied. The jurisdiction could be exercised, if the contract in question was executed or performed in China (or) if the subject matter of the dispute is located within China, (or) if the defendant has distrainable property within China, (or) if the defendant maintains a representative office within China. The relevant people's court that could exercise jurisdiction in this regard is also prescribed. In such cases, the CPL 2008 prescribes that jurisdiction could be exercised by the people's court of the place where the contract was executed, the place where the contract was performed, the place where the object of action is located, the place where the distrainable property is located, the place where the tort was committed or the place where the representative office is domiciled.²⁶

The CPL 2008 also expressly recognizes the jurisdiction of the people's courts in disputes relating to the performance in China of a Sino-foreign equity joint venture contract, a Sino-foreign cooperative joint venture contract or a contract for Sino-foreign cooperative exploration and development of natural resources. The recognition of jurisdiction of the people's courts in such disputes is in lines with the provisions of the previous legislation and judicial decisions. For example in *Ural Potassium Co. Ltd. v. Jinan Huaiyin General Chemical Factory*,²⁷ Shandong Higher People's Court decided in the second instance that since the case involved a Sino-foreign joint venture dispute the people's court had jurisdiction pursuant to Article 246 of the Civil Procedural Law 1991.

The specific rules dealing with foreign parties then recognizes the right of forum selection by parties of certain types of disputes. It provides that in contractual or property disputes involving foreign parties, a forum selection could be made by written agreement between parties subject to certain conditions. Firstly, the forum chosen by the parties should be in a place which has a real connection to the dispute in question. Secondly, if the parties choose the jurisdiction of a people's court in China, such selection should not violate the provisions of the CPL 2008 relating to jurisdiction by level and exclusive jurisdiction. The fact that the second condition is specifically

²⁶ See Article 241, Civil Procedure Law 2008.

²⁷ (2002) Lu Mingsi Zhongzi-No.2, the 2nd judgment of Shandong Higher People's Court as cited and discussed in Huang Jin and Du Huanfang 2005, op.cit.

related to parties choosing Chinese forums indicates that the first condition comprehends the possibility of choice of foreign forums. This could be argued as recognition of right of the parties to choose foreign forums in contractual and property disputes involving foreign parties. Finally, the specific provisions dealing jurisdiction indicates the right of a defendant in a civil action involving a foreign party to object to the jurisdiction of a people's court. However, such objection should be made before filing the defense and an act of responding to a suit by filing a defense without objecting to the jurisdiction is deemed as recognition of the jurisdiction of the court by the defendant.

The CPL 2008 addresses some other important issues related to disputes involving foreign parties. For example, the issue of serving of processes in cases involving foreign parties is addressed in detail. The CPL 2008 recognizes a range of people and methods to whom and through which a people's court could serve procedural documents on a foreign party. Firstly, the CPL 2008 recognizes a range of natural and legal persons on whom the processes could be served other than the party to be served. Services could be made on an authorized agent *ad litem* appointed by the person to be served. Similarly, services could be made on the representative office or branch or business agent in China authorized by the person to be served. Secondly, the CPL 2008 recognizes a range of methods of service of processes and documents. The method of services includes a method recognized by an international treaty concluded between or acceded to by China and the country of origin of the foreign party; service through diplomatic channels; service through the embassy or consulate of China in the country of location of the person to be served if such a person is a Chinese national; service by post, if permitted by the law of the country of the person to be served and service through public announcement.

Apart from CPL 2008, the issue of exercising jurisdiction over foreign parties is addressed by two other important instruments promulgated by the Supreme People's Court. Firstly, in 2002 "Jurisdiction Provisions 2002"²⁸ was promulgated on 25 February 2002 by the Supreme People's Court and became effective on 1 March 2002.²⁹ The Jurisdiction Provisions 2002 prescribes a set of people's courts which could exercise jurisdiction in first instance in Civil and commercial cases involving foreign elements. After elaborating the jurisdiction of different courts, the Jurisdiction Provisions 2002

²⁸ See the Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements 2002.

²⁹ The provisions were issued in accordance with the Article 19 of the Civil Procedure Law of the People's Republic of China 1991.

deals with the scope of its application through three major set of provisions. It enumerates a list of cases to which the provisions apply. It demarcates the cases which are not governed by these provisions and finally it addresses the scope of its applicability to cases involving Hong Kong, Macau or Taiwan. Secondly, in 2004 "Jurisdiction Notice 2004"³⁰ was promulgated by the Supreme People's Court on 29 December 2004 in order to strengthen the rules of jurisdiction governing 'commercial cases involving foreign elements'. The Jurisdiction Notice 2004 had introduced a range of measures relating to commercial cases involving foreign elements including introducing of reporting requirements for intermediate courts, enabling the designation of certain courts to exercise jurisdiction over foreign related commercial cases, introducing of measures to enhance the quality of trial and strengthening of the supervision and guidance in commercial cases involving foreign elements, etc. The Jurisdiction Notice 2004 especially authorizes the higher people's courts of Guangdong Province and all municipalities directly under the Central Government to designate the grassroots people's courts to exercise jurisdiction over the foreign-related commercial cases within their respective jurisdictional area. The courts designated to exercise jurisdiction of first instance are required to adhere to the relevant criteria, establish a special tribunal or collegiate court for such cases and equip with sufficient trial resources to ensure the trial quality. Training of judges of a court is required to be strengthened, if it is necessary to designate that court to exercise jurisdiction over commercial cases involving foreign elements. The higher people's courts are required to strengthen the supervision and guidance of relevant courts.

In spite of a range of measures, the judicial decisions in China relating to jurisdiction in general and jurisdiction over cases involving foreign elements are subjected to criticism for lack of proper analyzes of the underlying issues. The courts are often criticized for overlooking the issue of jurisdiction and thereby ending up unreasonably exercising jurisdiction. For example the decision to exercise jurisdiction by the higher people's court in *Jianguo Dockyard v. Yangzhou Branch of Chinese Industry and commercial Bank and Hong Kong Branch of China Bank*³¹ is subjected to such criticism. In this case, the plaintiff sued the defendants in Jiangsu Higher People's Court with regard to a dispute involving letter of credit. One of the defendants Hong Kong Branch of Bank of China challenged the jurisdiction of the court

³⁰ See the Notice of Supreme People's Court about Strengthening the Jurisdiction of Foreign-related Commercial Cases 2004.

³¹ (2001)-Su-Jing-Chuzi-No.3 (the 1st judgment of Jiangsu Higher People's Court) as cited and discussed in See Huang Jin and Du Huanfang 2003 'Private International Law in the Chinese Judicial Practice in 2001', Chinese Journal of International Law, vol.2, no.1, p.387.

on several grounds.³² However, the higher court rejected the objections to its jurisdiction based on based on Articles 38 and 243 of the Civil Procedure Law of 1991. The exercise of jurisdiction in this case is criticized as unreasonable.³³ It is argued that the connecting factors in this case pertaining to the parties, facts and subject matter were more close to Hong Kong than Mainland China in both quantity and quality. It is argued that the exercise of jurisdiction by a Hong Kong court would have been reasonable and convenient in this case. Since the judicial decisions in China do not deliberate the issue of jurisdiction in greater lengths, the judgments of the people's courts may not provide much insight into the principles of jurisdiction in China.

6. DOCTRINE OF *LIS PENDENS* AND *FORUM NON CONVENIENCE* IN CHINA

The people's courts in China are also criticized for their practice in applying the doctrine of forum non-convenience and the doctrine of *lis pendens*. Although it is generally considered that the Chinese law does not address the doctrine of *lis pendens*, it is argued the people's courts have taken diverse approaches to the question of recognition of the doctrine.³⁴ For example, The Supreme People's Court has clarified that in cases where both the Chinese courts and the foreign courts have jurisdiction, a people's court may accept jurisdiction when one party had initiated action in a foreign court and the other before the people's court.³⁵ The application of the doctrine of *lis pendens* by people's courts have been varying. For example, in *Tianjin Native Products Import & Export Company v A Belgian Company*³⁶ Tianjin Intermediate People's Court accepted the case even though the defendant had filed an action in a Belgian court seeking the payment for goods from plaintiff. The court accepted the case on the basis that the place of performance of the contract was China and delivered the judgment. The court is criticized for exercising jurisdiction in this case by overlooking the difficulties in enforcing its judgment in China because the defendant had no domicile or property in China. The court is also criticized for overlooking

³² The grounds of challenge were (1) the subject matter was not located in China; (2) Hong Kong Branch had no representative entity in Mainland China; (3) Hong Kong Branch had no property for arrest in Mainland China; (4) the applicant of the L/C, the issuing bank, the paying bank and the accepting bank were located in Hong Kong; and (5) the place of conclusion and performance of contract was not located in Mainland China. See *ibid*.

³³ See Huang Jin and Du Huanfang 2003, *op.cit*.

³⁴ See Qingjiang Kong and Hu Minfei 2002, 'The Chinese Practice of Private International Law', *Melbourne Journal of International Law*, vol.3, no.2, pp. 414-435.

³⁵ See Supreme People's Court, Article 305, *Opinions on Certain Questions Concerning the Application of the Civil Procedural Law of the People's Republic of China 1992*

³⁶ *Tianjin Intermediate People's Court 1992* in Lin Zhun (ed) 1996, *Selected Cases of Private International Law* pp.64-8 as cited and discussed in Qingjiang Kong and Hu Minfei 2002, *op.cit*.

the difficulties in enforcing its judgment in Belgium because the defendant had already initiated action there and the Belgian court had exercised jurisdiction.

In contrast to the above, in other cases people's courts have refused to exercise jurisdiction when there was a pending litigation elsewhere on the same dispute. For example, in *Zhong Gao Express Corporation (Taiwan) v Nei Tian Electronic Ltd*,³⁷ the Fujian Higher People's Court refused to exercise jurisdiction because the plaintiff had applied for a writ of payment in a Taiwan court and procured partial payment. The court held that it was inappropriate to bring a new action for the same cause of action in China. The differing results of the people's courts in such cases to accept or reject the doctrine of *lis pendens* has been criticized as an approach based on whether result would be favourable to the Chinese party.³⁸ Concerns have been expressed that such an approach would not assist international coordination of rules on jurisdiction.

Similarly, with regard to the doctrine of *forum non-conveniens* the Chinese courts have taken different approaches. The Chinese courts tend to apply the doctrine of *forum non-conveniens* in cases where both the parties are non-Chinese. Moreover, the courts seem to consider the issue of convenience of the court in such cases rather than those of the parties. However, there is a general trend of not applying the doctrine when cases involve a Chinese party. The Supreme People's court has recognized the doctrine in some of its notices to the people's courts of China relating to cases involving foreign elements. Similarly, the Model Law of Private International Law of the People's Republic of China published by the Chinese Society of Private International Law in 2000 called upon the people's courts to decline to exercise jurisdiction at the request of a defendant if the exercise of jurisdiction will result in two specific consequences. It is recommended that the people's courts should decline jurisdiction when it will result in obvious inconvenience to the parties and a more convenient forum exists.³⁹ In spite of some recognition given to the doctrine of *forum non conveniens*, it is argued that the general direction of the people's courts is not to give up jurisdiction in most cases.⁴⁰

³⁷ Higher People's Court of Fujian Province, 1995, Supreme People's Court 1996, Selected Cases of People's Courts pp.1368-75 as cited and discussed in Qingjiang Kong and Hu Minfei 2002, op.cit.

³⁸ See in Qingjiang Kong and Hu Minfei 2002, op.cit.

³⁹ See Article 51, Model Law of Private International Law of the People's Republic of China as cited and discussed in Mo Zhang 2002, 'International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System', Boston College International and Comparative Law Review, vol.25, p.59.

⁴⁰ Ibid.

7. INTERNET SPECIFIC MEASURES: THE CASE OF COYRIGHT

The Chinese courts have to primarily interpret the existing statutory provisions dealing with the general issues of jurisdiction in order to address challenges arising in the specific context of internet transactions. Such judicial interpretations made in the specific context of the facts of a case, along with the lack of rule of precedent in China, limits the role of judicial decisions in developing rules of jurisdiction governing relating to internet transactions. Although, the relevant provisions of jurisdiction in statutory instruments discussed earlier in this paper are broad in scope, they may not always be able to address a range of challenges that could arise in the specific context of the Internet transactions.

Unlike using judicial law making as an instrument to address complex and uncertain conflict of law issues arising in the context of the Internet, statutory measures comprehending such issues may not be easy and effective to create. Moreover, many of conflict of law challenges arising in the context of the Internet could be very specific based on the nature and method of transactions and any general set of written rules may not be able to address all those challenges. Therefore, specific legal instruments addressing the conflict of law challenges in different areas of the Internet transactions may become necessary. The experience in China reflects such an approach as the Supreme People's Court in China had created a legal instrument specifically identifying and interpreting several jurisdictional and applicable law issues in online copy right cases. The development of new technologies like the Internet and the vast amount of digital content it carries are perceived to have created many difficult challenges for the law and the Courts in China.⁴¹

The Chinese copyright law 1990 contained mainly limitations in addressing copyright challenges relating to online transactions since it was created before the Internet and E-commerce became popular. The limitations were exposed when the people's court was called upon to apply the law to a copyright dispute involving online transactions. In *Wang Meng, et al. v. Beijing Cenpok Intercom Technology Co., Ltd.*,⁴² the defendant, an Internet access and content provider was sued by the plaintiffs, a group of popular writers for posting their works online without authorization. The case was

⁴¹ The opinion of the Chief Justice Zhipei Jiang of Supreme Court of the People's Republic of China as expressed in his forward Brian Fitzgerald, et. al., eds. 2008, Copyright Law, Digital Content and the Internet in the Asia-Pacific, Sydney University Press, Sydney, pp. v-vi. The Chief Justice also cites the data that 17,769 intellectual property cases were filed before the courts in China during the year 2006 in order to show the increasing challenges in the field.

⁴² As cited in Andy Y. Sun 2000, 'Beijing Appeal Court Ruled on a Major Case: Copyright Liability for Internet Service Providers Determined', Asia Pacific Legal Institute Update, vol.1, no.1, pp.1-4.

first filed before a District People's Court in Beijing, where the plaintiffs argued that the act of the defendant constituted infringement of their copyrights and sought compensation for their economic losses and mental suffering. The court of first instance held the defendants liable and granted compensation to the plaintiffs' economic losses. The defendant appealed the decision to the Beijing First Intermediate People's Court.

The intermediate court was faced with the question whether the works posted on the Internet enjoy copyright protection? The defendant argued that the Chinese copy right law of 1990 did not contain any direct provisions addressing copyright protection in the context of online transactions. The intermediate court held that right of exploitation of the copyright owner recognized in the law includes the right to exploit the work in an online environment and hence the posting of the plaintiffs' works on the Internet by the defendant constituted copyright infringement. The court rejected several defenses⁴³ raised by the defendant and concluded that such acts are within the purview of the copy right law of 1990. The intermediary court expressed concern that acts of the unauthorized reproduction and distribution of copyrighted works over the Internet has the potential to cause more damages because of the nature and scope of transmissions over the Internet. The intermediate court although agreed that the copyright law of 1990 did not provide any rules for calculating damages for such cases, it affirmed the amount of compensation awarded by the lower court. Both courts have been subjected to the criticism⁴⁴ that they have exceeded their jurisdiction by unreasonably expanding the scope of the Chinese copyright Law without the authorization of the legislature or the Supreme People's Court. This criticism of exceeding the jurisdiction in order to apply the copyright law to online transactions prompted the Supreme People's Court to react even before the legislature.

The Supreme People's Court had promulgated "Computer Networks Interpretations 2000"⁴⁵ on 19 December 2000 and became effective on 21 December 2000. The major objective of the Computer Networks Interpretations 2000 is to ensure that the trials of copyright cases involving computer networks are heard correctly. It addresses the issue of jurisdiction relating

⁴³ The defendant raised several defenses like the argument that the posting of the works online was a fair use, the argument that the act fell within permissible statutory license because there was no profit taking involved, the argument that as an access provider, it had no control over the actual content of the concerned website, the argument that it was not aware of the infringing content and acted promptly to remove the contents after it was informed, the argument that it had provided a disclaimer in its website, etc.id at 2.

⁴⁴ Id at 3.

⁴⁵ See the Several Issues Concerning the Laws Applicable to the Trial of Copyright Disputes Involving Computer Networks Interpretations 2000.

to copy right infringement cases involving networks, interprets the substantial provisions of the copy right law of China in order to extend its scope to computer networks and identifies the applicable legal provisions in copy right disputes. With regard to the issue of jurisdiction relating to copy right infringements occurring online, the Computer Networks Interpretations 2000 contemplates two forums, which could try the case. The people's court at 'the place where the infringement occurred' or 'the place of domicile of the defendant' could exercise jurisdiction in online copyright infringement cases.

The place where the infringement occurred is broadly defined to include the place where related equipment such as network servers and computer terminals involved in the alleged infringement is located. This enables the possibility that an online copyright infringement action could be initiated in a range of places, where different client-server information technology equipment related to the network in question is located. Although action could be initiated in different places, it is not always easy to establish the place where the infringement occurred or the place of domicile of the defendant in cases relating to online copyright infringements. Given the technological possibility to carryout online infringement activities in clandestine, difficulties could often arise in identifying the places of infringement or domicile of the infringing party. In order to address such difficulty, the Computer Networks Interpretations 2000 expands the scope of definition of the place of infringement. It provides that in the event of such difficulties, the place of location of the equipment (such as the computer) on which the plaintiff discovered the infringing material could be deemed to be the place where the infringement occurred. Therefore, the defendant in copyright infringement cases could be sued in the places where their computers with the infringing materials are found, irrespective of question how they got access to those materials.

The Computer Networks Interpretations 2000 was one of the important instruments which address the need to protect copyrights in online transactions. As discussed earlier it was the judicial response to fill the gaps which were present in the Copyrights Law of 1990. Not only did the Computer Networks Interpretations 2000 filled up the existing gaps but also address evolving challenges. In order to meet the changing needs of copyrights protection in online environment the Computer Networks Interpretations 2000 has been revised several times since it became effective. For example, based on the experience in other jurisdictions, it was felt that there should be legal provisions addressing copyright circumventing technologies in China. To

address this issue, the Computer Networks Interpretations 2000 was revised subsequently in year 2004. The Revised Computer Networks Interpretations 2004⁴⁶ added new provisions to address copyright circumvention involving network service providers. It attached civil liability on network service providers if they uploaded, broadcasted or provided methods, equipment or materials with the knowledge that they could be 'specially used to deliberately avoid or destroy' the technical protection measures of the copyrights of others.

The Computer Networks Interpretations 2000 was further amended in 2005. The Supreme People's Court promulgated "Revised Computer Networks Interpretations 2005"⁴⁷ on 2 January 2005 and became effective on 7 January 2005. Firstly, Revised Computer Networks Interpretations 2005 omitted paragraph 2 of Article 2 of the Computer Networks Interpretations 2000 which contained the provisions referring to Article 10 of the Copyright Law of 1990, the provisions that equated the electronic means of exploiting the rights to the traditional means and the provisions referring to the right of a copyright owner to use or permit the use of the work in an online environment. Secondly, Revised Computer Networks Interpretations 2005 expands the provisions relating to para 2 of Article 7 of the Computer Networks Interpretations 2000 which referred to injunction (provisional ruling) against the network service provider failing to take measures after being warned about an infringement by a copyright owner. Thirdly, Revised Computer Networks Interpretations 2005 totally omitted Article 9 of the Computer Networks Interpretations 2000. Article 9 provided a list of specific provisions of the Copyright Law 1990 that will be applicable when determining different types of infringements of copyrights involving networks. Fourthly, the Revised Computer Networks Interpretations 2005 also omits Article 10 of the Computer Networks Interpretations 2000 which provided the rules for determining the measure of damages for online copyright infringements. Finally, Revised Computer Networks Interpretations 2005 also expands the new provisions relating to copyright circumvention involving network service providers introduced by the Revised Computer Networks Interpretations 2004. The Computer Networks Interpretations 2000 were further revised in 2006 when the Supreme People's Court decided to do away with the provisions which condoned online republication and excerpting of copyrighted works. Therefore, under the Revised Computer

⁴⁶ See Supreme People's Court, *Several Issues Concerning the Laws Applicable to the Trial of Copyright Disputes Involving Computer Networks Interpretation (Revised)* was promulgated on 2 January 2004 and became effective on 7 January 2004.

⁴⁷ See *Several Issues Concerning the Application of the Law in Trials of Copyright Disputes Involving Computer Networks Interpretations (Revised)* 2005.

Networks Interpretations 2006,⁴⁸ the Article 3 of the Computer Networks Interpretations 2000 relating to republication and excerpting of copyrighted works is omitted. The continued revision of the Computer Networks Interpretations of 2000 reveals the dynamic nature of online copyright issues in China and the need for evolution of the relevant rules of jurisdiction and applicable law governing the same.

8. CONCLUDING REMARKS

International enterprises and businesses dealing with China have often been skeptical about Chinese courts and reluctant to use China as a forum for re-dressing their legal disputes. Choice of arbitration or a foreign forum was generally preferred due to conflict of law concerns. The relatively recent opening up of the Chinese markets and ensuing concerns of lack of clarity and development of rules of jurisdiction governing foreign businesses have specifically contributed to the skepticism. China being a civil law system, the occasional jurisdictional decisions of Chinese courts involving foreign parties did not help much to shed light to status of general principles of jurisdiction. However, such skepticism and reluctance are increasingly becoming unjustifiable given the evolution of clearer and concrete principles of jurisdiction in China in recent years. The examination of the evolution and the current status of principles of jurisdiction relating to foreign parties in this paper undermine major concerns. A move from the initial piecemeal approach in addressing the issue of jurisdiction involving foreign enterprises to a more formal one within the Civil Procedure Regime in early 90s reveals a paradigm shift. It indicates the determination to formalize the regime and increase the viability of Chinese courts as potential forum for international dispute settlement. The experimentation of the regime over one and half decade and the resulting revamp of the same in 2008 from the valuable experiences gained, reveals a continued commitment to make Chinese forums more attractive.

The jurisdictional challenges facing internet transactions and the ensuing lack of clarity of conflict of law principles is facing most jurisdictions around the world. Common law jurisdictions tend to use cannons of judicial interpretations to adapt general principles of jurisdiction to address questions of jurisdiction arising in cyberspace. The increasing number of judicial decisions relating to cyberspace jurisdiction in some common law countries has started to throw some light regarding the evolution of relevant conflict of law principles in this complex field. In contrast, it is believed that con-

⁴⁸ See Several Issues Concerning the Application of the Law in Trials of Copyright Disputes Involving Computer Networks Interpretations (Revised) 2006 promulgated by the Supreme People's Court on 22 November 2006 and became effective on 8 December 2006.

crete rules of cyberspace jurisdiction could take longer in civil law traditions given the need to create or adapt formal statutory instruments. However, the examination of the experience in China reveals an interesting approach in this regard. Chinese judiciary, particularly the Supreme People's court had played a dynamic role in being instrumental in filling the statutory gaps in addressing jurisdictional questions. The analysis reveals that the practice of the Chinese apex court to issue interpretative instruments and notices addressing specific set of jurisdictional questions involving the Internet and foreign parties have enabled continuous evolution of the regime to meet changing demands, without having to wait for formal statutory revision or creation. This is particularly striking with regard to the issue of jurisdiction involving internet copyright issues. Although the potential issues of jurisdiction facing internet transaction are very diverse and the scope of the current Chinese Computer Networks Interpretations is limited, the fact that it had been periodically revised since 2000 indicates the willingness of the Chinese Apex Court to use this arsenal to address emerging issues of internet jurisdiction in China. This clearly creates an expectation that the Chinese Apex Court would continue to be a vanguard in addressing jurisdictional challenges involving foreign parties in general and internet transactions in particular. The overall analysis of the statutory evolution and judicial contribution in China relating to jurisdictional questions involving foreign parties and internet transactions challenges the myth that China may not be prepared to meet emerging conflict of law challenges.